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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION 4

THE PEOPLE, Plaintiff and Respondent, v. DAISHA TWYNETTE WILLIAMS, Defendant and Appellant.	A154635 (Contra Costa County Super. Ct. No. 5-172021-8)

Daisha Twynette Williams was convicted of multiple offenses arising out of an altercation with a tow truck driver attempting to repossess her car. On appeal, she contends the trial court committed prejudicial error by giving the jury an irrelevant and misleading instruction regarding her claim of self-defense. In response to a supplemental brief filed by Williams, we will vacate a protective order issued by the trial court, but otherwise affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

I. Prosecution's Case

On July 12, 2017, Fernando Solis went to Williams's home in order to repossess her car after receiving an order from the bank. Solis arrived around midnight and backed his tow truck up behind Williams's car, which was parked in her driveway. As Solis backed into the driveway, Williams ran out of her house and stood in front of her car, preventing Solis from getting any closer. Solis got out of his truck, identified himself,

and told Williams that he was there to repossess her car for failure to make payment to the bank. Williams became excited and hysterical, claiming she had made a payment.

Solis walked around Williams, opened the driver side door of her car and got in to access the VIN number. Williams jumped into the back seat and ordered Solis to get out. As Solis reached for a set of keys in the center console, Williams lunged forward and began threatening that she was going to stab him. Williams grabbed Solis's wrist and he pulled away from her, but did not strike her or threaten her. Williams got out of her car, saying, "if you are going to take my car, I'm going to take your tow truck." She then got into Solis's truck and drove off. Solis called 911.

Williams returned on foot two minutes later, and again threatened to stab Solis if he did not get out of the car. Williams went into her house for a few minutes then returned with "a bunch of stuff" in her hands. She approached the car and sprayed liquid-mist through a crack in the back window, which caused a burning sensation on Solis's skin and face. At one point, Williams unlocked the driver side door with her car key and was able to open the door. She stood a foot and a half away from Solis threatening to stab him before squatting down and stabbing Solis in the left thigh with a foot-long knife. Solis exited the car, not wanting to get stabbed again. Williams jumped into the driver seat and drove away.

An hour later, after the sheriff's department had arrived, Solis went to the hospital for treatment. About two weeks after the incident, Detective Jeff Rodier found a knife in Williams's bedroom that Solis said was similar to the one used during the incident. At trial, Solis identified two photographs of the stab wound in his leg that had been taken after the incident.

II. Williams's Defense

Williams testified in her own defense, giving the jury a materially different account of her encounter with Solis. She testified that at around 1:00 a.m. she woke to the sound of Solis's truck. She suspected her car was going to be towed because she was behind on her car payments, but she had previously made an arrangement with the financial company to make a late payment. She ran outside and stood by her car, trying

to get Solis's attention, but the hitch of the truck hit her leg before it stopped. As Solis exited the truck, Williams tried to explain her arrangement with the financial company, but Solis ignored her. Williams started to get scared due to Solis's aggressive demeanor. Solis refused to identify himself, and pushed past Williams to get into her car.

According to Williams, Solis sat in the driver's seat of her car, opened the glove box, and started going through her things. Williams feared that Solis was going to take her belongings, so she got into the back seat to retrieve her phone, and repeatedly told Solis to get out of the car. When Williams reached into the center console for her phone, Solis elbowed her in the face, cutting open her lip. Williams still did not know who Solis was, and was afraid for herself and her property. Williams got out of her car and, hoping that if she moved Solis's truck off her property he would leave, drove the truck up the street and then walked back. Seeing Solis still in her car, Williams went inside her house to get her car keys. She told the jury that she did not get a knife, or at any time threaten to stab Solis.

Williams testified that when she came back outside she repeatedly tried to unlock the car, but Solis kept locking it from the inside. Noticing the pepper spray on her keys, Williams warned Solis that if he did not get out of the car, she would spray him. All the car windows were closed, but out of fear for herself and her car, Williams sprayed the pepper spray once towards the back of the car. Williams did not intend to hurt Solis, only spur him to get out of her car. Then, her roommate came out of the house and told Solis to leave. Solis exited the car completely uninjured. Williams got into the driver seat and drove away because she was scared and didn't know what else to do.

III. Trial Proceedings

Williams was tried on five charges: carjacking (count 1; Pen. Code, § 215, subd. (a))[1]; criminal threats (count 2; § 422, subd. (a)); assault with a deadly weapon (count 3; § 245, subd. (a)(1)); use of tear gas (count 4; § 22810, subd. (g)(1)); and driving or taking

[1] All undesignated statutory references are to the Penal Code.

a vehicle without consent (count 5; § 10851, subd. (a)). After the parties presented evidence and rested their cases, the court instructed the jury. It began by saying that the jury, and the jury alone, was in charge of determining what the facts of the case are. The court also said, "[s]ome of these instructions may not apply, depending on your findings about the facts of [the] case. Do not assume just because I give a particular instruction that I am suggesting anything about the facts. After you have decided what the facts are, follow the instructions that do apply to the facts as you find them."

Following a set of general instructions, the court instructed the jury regarding the elements of the charged crimes and lesser offenses, and then turned to Williams's theory of self-defense. The jury was instructed that self-defense was a defense to the charges of assault and use of tear gas, and that the People carried the burden of proving beyond a reasonable doubt that this defense did not apply. The court used CALCRIM 3470 to instruct the jury regarding the elements of the defense, which states that the use of force against another person is lawful if the defendant (1) reasonably believed she was in imminent danger of suffering bodily harm, (2) reasonably believed that the use of immediate force was necessary to defend against the danger, and (3) used no more force than was reasonably necessary. Over the People's objection, the court gave CALCRIM 3476, which addresses a defendant's right to use force to protect property from imminent harm. The jury was also instructed with CALCRIM 3471, which states that a defendant who engages in mutual combat or starts a fight has the right to use self-defense only if (1) she made a good faith effort to stop fighting, (2) she indicated, by word or conduct in a way that a reasonable person would understand, that she wanted to stop fighting, and (3) she gave her opponent a chance to stop fighting. Finally, the court gave the instruction that is the subject of this appeal, CALCRIM 3472, which states, "A person does not have the right to self-defense if he or she provokes a fight or quarrel with the intent to create an excuse to use force."

After deliberating, the jury returned the following verdicts: Count 1 - guilty of carjacking; Count 2 - not guilty of criminal threats; Count 3 - not guilty of assault with a deadly weapon, but guilty of the lesser offense simple assault; Count 4 - guilty of use of

tear gas; and Count 5 - guilty of driving or taking a vehicle without consent. The court sentenced Williams to a total prison term of 3 years.

DISCUSSION

Williams concedes that CALCRIM 3472 is a correct statement of the law, but nevertheless contends that this instruction should not have been delivered to the jury because it was not supported by the evidence at trial and because it misled the jury to believe that she was foreclosed from raising a self-defense claim. Williams argues that because this instruction was erroneously given, her convictions for simple assault and use of tear gas must be reversed.

The People argue that Williams forfeited her claim because she did not object to CALCRIM 3472 in the trial court. "Generally, a party forfeits any challenge to a jury instruction that was correct in law and responsive to the evidence if the party fails to object in the trial court. [Citations.] The rule of forfeiture does not apply, however, if the instruction was an incorrect statement of the law [citation], or if the instructional error affected the defendant's substantial rights. [Citations.] ' "Ascertaining whether claimed instructional error affected the substantial rights of the defendant necessarily requires an examination of the merits of the claim—at least to the extent of ascertaining whether the asserted error would result in prejudice if error it was." ' " (*People v. Franco* (2009) 180 Cal.App.4th 713, 719.)

Assuming for the sake of argument that there was no evidence to support the delivery of CALCRIM 3472 and that giving the instruction was error, we conclude it resulted in no prejudice. Williams argues that CALCRIM 3472 misled the jury to believe that she was foreclosed from raising a self-defense claim to the assault and use of tear gas charges, thus depriving her of her federal constitutional right to present a defense, to due process of law, and to a fundamentally fair trial. " 'When reviewing a supposedly ambiguous [i.e., potentially misleading] jury instruction, " 'we inquire "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way" that violates the Constitution.' " ' " (*People v. Ayala* (2000) 24 Cal.4th 243, 289.) We assume that, " ' "the jurors [are] intelligent persons and capable of understanding *and*

correlating all jury instructions . . . given." ' " (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1089.)

According to Williams, CALCRIM 3472 misled the jury to believe that it could not find she had a right to self-defense if it thought that she was responsible for initiating the verbal altercation with Solis. We disagree because the jury was separately instructed with CALCRIM 3471 regarding when an initial aggressor can use self-defense, and Williams does not dispute that CALCRIM 3471 was properly given. CALCRIM 3472 addresses a different situation—when there is evidence the defendant started a fight so she would have an excuse to use force in self-defense. When this is the case, a defendant loses her ability to claim self-defense. But if this instruction does not fit the facts of this case, it is only because Williams had no basis for arguing self-defense with regard to either of her assaults on Solis.

Reviewing the facts surrounding the misdemeanor assault and use of pepper spray, nothing about the way Williams acted indicates she reasonably believed she was, at that time, in danger of death or serious bodily harm, and that she needed to use force to defend herself. After taking Solis's truck, she did not drive away from the alleged danger, or phone the police for help, but rather returned to the scene. She then entered her house and, instead of staying safely there, again returned to where Solis was secluded in the car to continue the altercation. This is not the behavior of a person fearing for her safety. Williams might have had a claim of self-defense at the beginning of the altercation when, according to her, Solis pushed past her to get to the car, and then elbowed her in the face. However, once Williams removed herself from the car and entered the safety of her home, only to return to continue the altercation, she lost her self-defense argument.

Williams has not explained how the evidence could be construed to support a claim of self-defense with regard to the events that both occurred after she returned to where Solis was in the driver's seat of her car. So, while it may have been error to instruct the jury on CALCRIM 3472, any such error was harmless because it was not the instruction that foreclosed her from claiming self-defense. Her own actions did that.

Therefore, delivery of CALCRIM 3472 did not violate Williams's constitutional right to present a defense, to due process of law, or to a fundamentally fair trial.

Williams analogizes her case to *People v. Conkling* (1896) 111 Cal. 616 (*Conkling*), where the defendant was charged with the murder of a neighbor with whom he had an ongoing dispute regarding access to a road. (*Id.* at p. 620.) At trial the defendant argued self-defense. (*Id.* at p. 621.) The jury was instructed that killing someone for obstructing a road is not justified, and that if they believed the defendant killed the victim, "then, to render such killing justifiable, it must appear that the defendant was wholly without any fault imputable to him by law in bringing about the commencement of the difficulty in which the mortal wound was given." (*Id.* at p. 624.) The jury was further instructed that "an honest apprehension of danger to life or limb" justifies taking a life only if that "apprehension [arose] out of a reasonable cause," but a cause that originated in the fault of the person himself, in a quarrel he provoked, or in a danger he voluntarily brought upon himself by his own misconduct, could not be considered "reasonable or sufficient in law to support a well-grounded apprehension of imminent danger to his person." (*Id.* at pp. 624–625.) Moreover, the jury was instructed that "a real or apparent necessity, brought about by the design, contrivance, or fault of the defendant, cannot be availed of as a defense for the commission of a crime or a homicide." (*Id.* at p. 625.)

The *Conkling* jury convicted the defendant of first degree murder, but the California Supreme Court reversed because of multiple trial errors, including prejudicial juror misconduct, the admission of irrelevant evidence regarding ownership of the land over which the road passed, and erroneous instruction regarding the self-defense claim. In concluding that the self-defense instructions violated defendant's rights, the court first found there was no evidence to warrant instructions regarding the circumstances under which an initial aggressor may use self-defense. Then the court found that the error was prejudicial because the jury could have interpreted the instructions to mean that if the defendant's attempt to travel the road was wrongful then he could not claim self-defense, which was not the law. (*Conkling, supra,* 111 Cal. 616 at p. 625.)

Williams contends her case is like *Conkling* because evidence suggesting that she was the initial aggressor could have misled the jury to interpret CALCRIM 3472 as fatal to her claim of self-defense. This reasoning is flawed. Unlike the *Conkling* jury, the jury in this case received the correct instruction regarding the circumstances under which an initial aggressor may use force to defend herself—CALCRIM 3471. Also, although the *Conkling* jury was instructed that self-defense cannot be contrived, that principle was potentially misleading in *Conkling* because there was evidence the defendant had provoked the conflict over his access to the road, which was arguably a contrivance but had no bearing on the right to self-defense. And there was also evidence that Conkling's neighbor had initiated the use of force raising substantial issues of self-defense not present here.

Williams also relies on *People v. Olguin* (1994) 31 Cal.App.4th 1355 (*Olguin*). In that case, one defendant punched the victim to the ground, and then another defendant shot the victim as he tried to retaliate. (*Id.* at p. 1367.) The jury was instructed with a series of CALJIC self-defense instructions, including CALJIC No. 5.55 that " '[t]he right of self-defense is not available to a person who seeks a quarrel with the intent to create a real or apparent necessity of exercising self-defense.' " (*Id.* at p. 1381, fn. 10.) The instruction was not objected to at trial, but on appeal one defendant claimed that it was erroneous. (*Id.* at p. 1381.) The court found that the instruction should not have been given because it was not supported by the evidence, but there was no reversible error because under the facts presented the instruction was essentially irrelevant and it was not reasonably likely the jury was misled to think that it applied. (*Olguin* at pp. 1381–1382.)

Williams argues that her case is like *Olguin* because there was no evidence to support an instruction that "self-defense may not be contrived," but then tries to distinguish her case from *Olguin* by arguing that in her case the jury was likely misled to believe that the instruction was relevant. She argues that in *Olguin* the jury instructions were more comprehensive and so it would have been obvious to the jury that some of them were mutually exclusive. She also argues that the *Olguin* instruction to disregard instructions that did not apply to the facts was more strongly worded than in her case.

These arguments are without merit. There is no prejudice here because, as in *Olguin*, CALCRIM 3472 was delivered as one of a long list of other jury instructions, and the jury was similarly instructed to disregard *any* instruction not supported by the evidence. While CALICRIM 3472 may not have had evidentiary support, its delivery was not prejudicial, and so any error was harmless.

Appellant also cites to *People v. Rogers* (1958) 164 Cal.App.2d 555, in which the defendant stabbed the victim in a brawl outside his friend's home and then claimed self-defense. (*Id.* at p. 557.) The court instructed the jury that "one 'who has sought or induced the quarrel' cannot assert self-defense unless he 'decline further combat, honestly endeavor to desist therefrom, and fairly and clearly inform his adversary . . . of his desire for peace, and that he has abandoned the contest.' " (*Ibid.*) The instruction correctly stated the law, but the court found that it was erroneously given because it had no application to the facts and was prejudicial. (*Id.* at pp. 557–558.) It had no application because "there was no evidence that [defendant] attempted to withdraw from the melee or notified his opponents of his desire to do so" (*id.* at p. 558), and it was prejudicial because the evidence suggested a classic case of self-defense. There was "no showing that defendant advanced to meet decedent. On the contrary, there was some evidence that decedent advanced upon defendant before this pair began fighting." (*Id.* at p. 557.) *Rogers* is distinguishable from our present case on the issue of prejudice because here, it was Williams who advanced to meet Solis, not the other way around. After returning to her home she came back to the locked car, repeatedly tried to unlock the door, and threatened to pepper spray and stab Solis.

For all these reasons, we conclude that while giving CALCRIM 3472 may have been an error, any error was a harmless because giving the instruction did not violate Williams's substantial rights.

Williams filed a supplemental brief arguing two points: (1) the trial court should be directed to vacate the protective order issued pursuant to section 136.2, and (2) the concurrent term imposed on count five should have been stayed under section 654. The Attorney General concedes that the protective order should be vacated, and we agree

because protective orders issued pursuant to section 136.2 are "limited to the pendency of the criminal action in which they are issued or to probation conditions" (*People v. Stone* (2004) 123 Cal.App.4th 153, 159), and Williams has been sentenced to state prison. Regarding the concurrent term imposed for count five, we conclude section 654 does not apply. Section 654 states, in part, that "in no case shall the act or omission of [a defendant] be punished under more than one provision." Section 654 does not apply here because count one and count five refer to different vehicles. Carjacking (count one) refers to the act of Williams taking the Toyota Camry (which at the time belonged to the bank), and taking or driving a vehicle without consent (count five) refers to her driving away the Dodge tow truck. Because these are different acts, we disagree that the sentence imposed on count five must be stayed under section 654.

DISPOSITION

The protective order issued by the trial court is vacated, but otherwise the judgment is affirmed.

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TUCHER, J.

WE CONCUR:

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STREETER, Acting P. J.

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BROWN, J.